CHUA KIM SUAN & TEOH TEIK NAM (SUING AS ADMINISTRATRIX AND ADMINISTRATOR RESPECTIVELY OF THE ESTATE OF TEOH TEK LEE, DECEASED)

v.

GOVERNMENT OF MALAYSIA & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATO' PEH SWEE CHIN SCJ
[CIVIL APPEAL NO. 01-36-91]
2 DECEMBER 1993

TORT: Claim for loss of earnings - Income from illegal source - Whether court can entertain - Taxable income - Notice of assessment of income tax.

The appellant claimed loss to the estate including loss of earnings for the lost years of the deceased who was killed in a motor accident. The learned Registrar accepted that the deceased had 3 sources of income. The Registrar however declined to take account of income earned by the deceased in running a taxi which was not licensed in the name of the deceased, but in the name of the father of the deceased, the said father having predeceased some years previously. The learned Registrar further referred to the relevant notice of assessment of income tax payable by the deceased which stated that the deceased's taxable income as RM10,176 for the whole year and averaged it to RM866.79 per month which she adopted as the basic loss of earnings *per mensem*, thus ignoring the earnings from the three sources which she specifically found. The learned Judge confirmed the whole of the order of the learned Registrar. The appellant appealed.

Held:

[1] The claim for that part of damages as related to earnings from illegal operation of the taxi should be disallowed, because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. The maxim has a limited application in tort. The maxim's principal rule lies mainly and almost exclusively in actions on contract.

[2] A Court has to act on evidence adduced before it and to give due weight, if any, to it. A Court should regard such similar figure from any similar notice of assessment as *res inter alios* and consider the evidence with an open mind. In the instant case, the income as found and assessed by the learned Registrar was income not illegally earned, it should be adopted and accepted by her.

[Order of High Court set aside and varied].

[**Bahasa Malaysia** Translation of Headnote]

TORT: Tuntutan bagi kehilangan pendapatan - Pendapatan daripada sumber haram - Sama ada Mahkamah boleh melayannya - Pendapatan yang boleh dicukai - Notis taksiran cukai pendapatan.

Perayu menuntut kehilangan kepada harta pusaka termasuklah kehilangan pendapatan bagi tahun-tahun kehilangan akan simati yang terbunuh dalam suatu kemalangan motor. Pendaftar yang arif menerima bahawa simati mempunyai 3 sumber pendapatan. Walau bagaimanapun pendaftar enggan mengambilkira pendapatan yang diperolehi oleh simati dalam memandu teksi yang tidak dilesenkan diatas nama simati, tetapi diatas nama bapa simati yang telah meninggal dunia beberapa tahun sebelumnya. Pendaftar selanjutnya merujuk kepada notis taksiran cukai pendapatan simati ialah sebanyak RM10,176 bagi satu tahun dan dihitung kepada purata RM866.79 sebulan yang mana beliau menerimanya sebagai kehilangan asas pendapatan sebulan, dan dan dengan itu tidak mengendahkan pendapatan daripada tiga sumber lain yang didapati secara khusus oleh beliau. Hakim yang bijaksana mengesahkan keseluruhan perintah Pendaftar tersebut. Perayu membuat rayuan.

Diputuskan:

[1] Tuntutan bagi bahagian ganti rugi berhubung dengan pendapatan daripada pengendalian haram teksi berkenaan tidak harus dibenarkan kerana *ex turpi causa non oritur actio* atau dalam erti kata lain, tuntutan sedemikian adalah bertentangan dengan polisi umum. Pepatah tersebut mempunyai

pemakaian yang terhad dalam tort. Kaedah utama pepatah tersebut bergantung sebahagian besarnya dan hampir secara eksklusif dalam tindakan atas kontrak.

[2] Mahkamah perlu bertindak atas bukti yang dikemukakan di hadapannya dan memberi apa-apa pertimbangan yang wajar, jika ada, kepadanya. Mahkamah haruslah menyifatkan sebarang angka yang sedemikian daripada notis taksiran yang sedemikian sebagai *res inter alios* dan menimbang bukti tersebut dengan fikiran yang terbuka. Dalam kes ini, memandangkan pendapatan yang didapati dan ditaksirkan oleh Pendaftar merupakan pendapatan yang diperolehi dengan sah, maka ia haruslah diterima dan dipersetujui oleh beliau.

[Perintah Mahkamah Tinggi diketepikan dan diubah].

Cases referred to:
Yaakob Foong v. Lai Mun Keong & Ors.[1985] 1 CLJ 355 / [1986] 2 MLJ 317 ***(foll)***
Kang Bak Teng & Anor. v. Lee Kwee Lim & Anor. [1952] MLJ 27 ***(ovrl)***
Tan Chooi Thin & Anor. v. Teo Whee Hong [1953] MLJ 203 ***(ovrl)***
Ooi Han Sun v. Bee Hua Meng [1991] 3 MLJ 219 ***(foll)***
Burns v. Edman [1970] 2 QB 54 ***(foll)***
Lebagge v. Buses Ltd [1958] NZLR 630 ***(foll)***
Dhlamini v. Protea Assurance [1974] (4) SA 906(A) ***(foll)***
Cookson v. Knowles [1977] 2 All ER 820 ***(cit)***
Gammell v. Wilson [1981] 2 WLR 248 ***(cit)***
Yang Salbiah v. Jamil bin Harun [1981] 1 MLJ 292 ***(cit)***

Legislation referred to:
Civil Law Act 1956, s. 7
Road Transport Act 1987
Road Traffic Ordinance 1958, s. 126

For the appellants - Gurbachan Singh; M/s. Bachan & Kartar
For the respondents - Al-Baishah bte Haji Abdul Manan, SFC

JUDGMENT

Peh Swee Chin SCJ:
The main question that confronts this Court squarely is as to whether a claim in tort for loss of earnings obtained from an illegal source can be entertained by a court as there appears to be a conflict on the point in decisions of the High Court. There are other minor issues also in this case. A summary of material facts and issues is set out below.

Administrators of the estate of one Teoh Tek Lee deceased, (hereafter the deceased), claimed loss to the estate including loss of earnings for the lost years of the deceased who was killed in a motor accident in respect of which the action was filed. Liability was conceded by the defendants and the assessment of damages was heard before the learned Registrar who found after taxing down rather drastically earnings figures stated in evidence and accepted that the deceased had 3 sources of income, the first of which was Yew Lee Estate from which the deceased earned RM518 per month, the second, Yew Lee Seng Kee (M) Sdn Bhd., from which he earned RM325 per month, and the third, a firm called Taiping Amusement, from which he earned RM55 per month. The learned Registrar declined however to take account of income earned by the deceased in running a taxi which was not licensed in the name of the deceased, but in the name of the father of the deceased, the said father having predeceased the deceased some years previously. She further referred to the relevant notice of assessment of income tax payable by the deceased and issued by the Director General of Inland Revenue to the deceased when alive, in which, the deceased's taxable income was stated therein as RM10,176 for the whole year and learned Registrar averaged it to RM866.79 per month which she adopted as the basis loss of earnings *per mensem*, thus ignoring, to all intents and purposes, the earnings from these sources which she specifically found. She then used this figure of RM866.79 in assessing "pre-trial" loss for the period of 8 years and 7 months at RM866.79 per month with usual interest of 8% p.a. and "post-trial" loss of earnings of 9 years and 5 months at RM866.79 p.m. The two periods of 8 years and 7 months and 9 years and 5 months total 18 years which the learned Registrar stated to the effect was the number of years of purchase awarded for loss of future earnings for the deceased, a way of assessment of damages which is clearly erroneous.

For special damages, she awarded RM4,500 for funeral expenses; RM400 for cost of letters of administration and RM6,500 for loss of expectation of life. The learned Registrar did not write grounds of decision and in her brief findings and order she recorded at the end of notes of evidence she made no allowance for the sum of RM1,500 per month as the sum which the deceased earned from the taxi. It was streneously argued earlier by learned Counsel for the defendants on ground of illegality that such sum should be excluded from damages to be awarded. The learned Registrar apparently accepted such submission.

The administrators of the estate of the deceased, not being satisfied with the damages thus awarded, appealed to the Judge in Chambers from the decision of the learned Registrar only on 2 questions *viz.* first, the learned Registrar should not have refused to take into account the earnings from the taxi licensed in the name of the father of the deceased and secondly, the learned Registrar should not have adopted the average monthly income computed from the notice of assessment of income tax for the relevant year, in other words, by disregarding the income of the deceased from the 3 other sources as found by her. The learned Judge dismissed the appeal with costs and confirmed the whole of the order of the learned Registrar.

The licence for the taxi in question was issued to the name of the father of the deceased in 1976 and was expressed to be valid until 1983, when it would then expire. The said father died in 1977 and thereafter, the taxi continued to be operated by the deceased purportedly under the father's licence until 1982 when he himself died without having ever applied himself in his lifetime to the Road Transport Licensing Board for a transfer of licence to his own name or to the name of administrator of the estate of the said father.

From the evidence, it appeared that some of the officers of the Road Transport Department were aware of the death of the said father and allowed the continued operation of the taxi by the deceased without ever prosecuting the deceased in respect of it.

Under the previous Road Traffic Ordinance 1958, (since repealed and replaced by the Road Transport Act 1987), in respect of a licence of taxi as applicable to the deceased, its s. 126 thus provided:

> Section 126(1) Subject to the provisions of subsection (3) of this section, a licence granted under this Part of this Ordinance shall be personal to the holder thereof, and shall not be transferred or assigned. Except with the previous consent of the Licensing Board the holder of such licence may not appoint an agent or an attorney for the purpose of exercising any of the rights conferred on the licence holder. The holder of such licence shall not cause or permit any such agent or attorney to exercise any such rights.
>
> (2) Any holder of a licence granted under this Part of this Ordinance who purports to transfer or assign the licence, or causes or permits any other person to use an authorised vehicle or to provide the service authorised in the licence, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand five hundred dollars or to both such imprisonment and fine.
>
> (3) The Licensing Board may in the event of the death, incapacity, bankruptcy or, in the case of a company, liquidation of the holder of such licence, or where a receiver or manager is appointed in relation to the business of the holder of such licence, or where for any reason the Licensing Board is satisfied that it would be unjust not to do so authorise the transfer of such licence.

It is to be borne in mind that the Road Transport Licensing Board under the said Ordinance was separate and independent from the civil servants that staffed the Road Transport Department engaged in overseeing *inter alia,* the compliance by the public of the provisions of the said Ordinance, while members of the said licensing board were appointed by the Minister of Transport usually from members of the public for granting, revocation or suspension of public service vehicle licences such as the licence for a taxi. The fact that officers of the said department did not initiate any prosecution for any offence in respect of the use of the taxi licence could not legally amount to any

such previous consent of the licensing board to the continued use of the taxi by the deceased as stated in s. 126 above.

Such use of the taxi licence by the deceased could undoubtedly be an offence under s. 126 of the Road Traffic Ordinance 1958, nothwithstanding the extenuating circumstances accompanying such user which could have mitigated greatly the punishment of the deceased had he been prosecuted. The continued use of the taxi licence by the deceased was undoubtedly also illegal, and the income earned from such illegal activity was therefore illegally obtained. It was not disputed by the parties herein that such income had amounted to about RM1,500 per month.

The learned Judge in the High Court had 3 decisions cited to him, *viz. Yaakob Foong v. Lai Mun Keong & Ors.* [1986] 2 MLJ 317; *Kang Bak Teng & Anor. v. Lee Kwee Lim & Anor.* [1952] MLJ 27; *Tan Chooi Thin & Anor. v. Teo Whee Hong* [1953] MLJ 203 and in the event that has turned out, the learned Judge followed *Yaakob* but declined to follow the other two, upholding the decision of the learned Registrar in not taking account of the earnings that came from the operation of the taxi.

On this question, we briefly review the 3 cited cases. The first case is *Kang Bak Teng's* case, *supra,* decided in 1950. The deceased, Kang, while travelling in a lorry was killed in a collision between the lorry and a motorcar. The administrators of estate of Kang sued both drivers for negligence for the benefit of the dependants comprising the widow, son and the mother of the deceased. The deceased was an unlicensed hawker of pork for some years. All defendants there did not raise any objection to the evidence of such income from the business of unlicensed hawking. The learned Judge took into account of such income of the deceased but apparently gave effect to some shortening of period of continuance of such support to the dependants because, according to the learned Judge being an unlicensed hawker, the deceased was liable to eviction from the place where his stall was, and also to confiscation of goods and prosecution. The learned Judge awarded a comparatively small sum of RM5,000 as loss of support to the dependants, and though nothing was said as to how the learned Judge came to this figure, there was no doubt the aforesaid shortening of period had figured in the assessment.

In *Tan Chooi Thin's* case, *supra,* decided in 1937 the learned Judge there had to consider some allegation that the deceased who was also killed in a motor accident, had derived some income from smuggling of some precious stones contrary to customs legislation. The learned Judge then said, *obiter,* that if there was reliable evidence of profit from this, he would include such income for assessing the deceased's earnings there. His reasoning for allowing such income, if there was sufficient evidence for it, was, *inter alia,* to draw an anology from an action by an unlicensed driver against another driver for negligence. Such unlicensed driver would not be barred from such action for damages.

In *Yaakob* case, *supra,* decided in 1986, the plaintiff was a Malaysian working in Singapore. In assessing the plaintiff's earnings in Singapore, while considering the plaintiff's admission that no income tax was paid by him to Singapore tax authority and that some extra work he did was in contravention of his work permit issued by Singapore Government, the learned Judge observed, also *obiter,* to the effect that, if there had been cogent evidence of the precise amount of income tax which would have been payable by the plaintiff, and the amount which he illegally earned in thus contravening his work permit, he would have made the necessary deductions. The learned Judge appears to have clearly dissented from the decisions in *Kang* and *Tan, supra* on the point in question.

We have had however the benefit of reading the judgment of the learned Chief Justice of Singapore in High Court Singapore case of *Ooi Han Sun v. Bee Hua Meng* [1991] 3 MLJ 219, in which not only the 3 cases cited above, but some other cases in other common law jurisdictions were also reviewed. The learned Chief Justice held to the effect that in a claim by

a Malaysian plaintiff in an action for negligence for loss of earnings obtained by working in Singapore without a work permit from the Singapore authority, it would be against public policy for the court to entertain a claim for such loss of earnings in Singapore but the Malaysian plaintiff was instead awarded damages based on an estimate of what he would have earned in Malaysia.

The High court in Singapore also reviewed, before coming to its aforesaid decision, *Burns v. Edman* [1970] 2 QB 54 in which Crichton J., in a case in which the widow of a man killed in an accident had claimed damages for loss of dependency, held that since the earnings came from proceeds of crime committed by the deceased husband, she could not succeed in claiming such damages, even as a dependant and that *ex turpi causa non oritur actio* applied. Then yet another case was reviewed; that came from the Court of Appeal of New Zealand in *Lebagge v. Buses Ltd.*[1958] NZLR 630. In that case, the deceased was killed also in a motor accident, and the administrator claimed damages on the basis of his operation of a truck to fulfil his milk contract seven days a week. Defendant in opposing the claim there apparently submitted that the basis should be 6 days a week and not 7 days because Transport Licensing Regulations 1950 of New Zealand prohibited anybody driving such a truck without having at least 24 consecutive hours for rest in any given 7 days. The Court then held that the action filed by the widow was free from and unaffected by illegality, with reference to the milk contract, and the claim was allowed on the basis of 7 days though it was proper to take into consideration the possibility that the said Regulations might be enforced against the deceased with the deceased's income thereby diminished, a reasoning in similar vein to that in *Kang supra.*

The learned Chief Justice of Singapore also reviewed a case in the South African Court of Appeal of five Judges in *Dhlamini v. Protea Assurance* [1974] (4) SA 906 (A) in which it is said to have been held that plaintiff, an unlicensed hawker for 20 years had her claim for damages based on the loss of earnings from unlicensed hawking disallowed on the ground of such claims being against public policy.

We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun; Burns; Lebagge and Dhlamini, supra* and approve the *dictum* in question in *Yaacob.* We therefore uphold the decision of the learned Judge in the Court below and that of the learned Registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi's* case, *supra* that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present times.

We have realized, of course, that in any case when the claim for dependency is

solely based on income earned from an illegal activity, the dependants, though completely innocent of the illegality, will suffer an injustice and the tortfeasor, will obtain an undeserving windfall. The dependants' interests are thus seen to be irreconcilable with the interests of the law; the latter are, to provide certainty of the law but yet give rise to an injustice in such a situation.

The interests of the law are beyond providing mere certainty of the law. They are also to protect society from illegal activities which, if allowed to pass without judicial castigation would encourage such illegal activities, and allow the perpetrators to set an example to fellow-citizens to regard such illegal activities with tolerance and a desire to follow the same. The insidious consequences are not hard to imagine. With religion losing its grip to significant numbers of society, the interests of law in this sense would have to be rigourously upheld. We therefore are of the opinion that such personal interests of such dependants or other claimants would have to be sacrificed for the greater interests of the law.

We now deal with the complaint that the learned Registrar was wrong in confining herself to the Inland Revenue's notice of assessment of income tax and to, pay the same as served on the deceased, in arriving at the monthly figure of RM866.79, being the average monthly figure of the total assessable income for the relevant year for RM10,401.50. We set out below parts of the relevant findings of the learned Registrar which she wrote at the end of the evidence:

> Simati ada tiga sumber pendapatan. Yew Lee Estate RM6,176.50 sen setahun atau RM518 sebulan. Yew Lee Seng Lee (M) Sdn. Bhd. RM4,225 setahun atau RM325 sebulan. Syarikat Taiping Amusement RM660 setahun atau RM55 sebulan. Sumber pendapatan teksi tidak dikira 'personal to holder'. Mengikut 'income tax assessment', ia menerima RM10,401.50 sen setahun atau RM886.79 sebulan.
>
> Pre-trial loss:
> From 23/5/82 to 23/12/90 - 8 years 7 months
> RM866.79 x 8 years 7 months
> Interest at 8% per annum
>
> Loss of future earnings:
> No. of years' purchase - 18 years
> (Retirement age - 60)
>
> Post-trial loss:
> 23/5/82 - 23/12/90
> 9 years 5 months
> RM866.79 x 9 years 5 months
> No interest

It is pertinent to point out that the fatal accident took place in 1982 and therefore the Civil Law (Amendment) Act 1984, which came into effect on 1 October 1984 does not apply to this case.

After cutting down considerably the amount of claim of the plaintiffs for the loss of income from the legal sources as appears from the evidence, the learned Registrar specifically found, by the clearest implication from her notes set out above, that the deceased had earned a total sum, from these 3 legal sources of RM898 a sum for which there is no good reason for the Court to interfere with, though it represents a small portion of the amount of RM5,000 (excluding the hefty sum earned from the taxi) as claimed by the plaintiffs in evidence. The learned Registrar could have cut down the amount so much on account of finding exaggeration in the relevant evidence. One would not therefore expect her to reduce it further. She then referred to the average monthly figure of the taxable income from the Inland Revenue's bill to the deceased tax-payer, and adopted this average monthly figure of RM866.79. The inference seems to be that she felt bound to accept this figure from the Inland Revenue's source. The difference between RM898 and RM866.79 is small but a question of principle thus arises. Is a court bound by such similar figure?

We do not think that any court is bound by such a figure; it is relevant for cross-examination and for consideration by the Court as to any probability of any income figure claimed by a plaintiff in evidence. The jocular and popular expression of the "national pastime" of (legitimate) avoidance of income tax liability comes to mind in the sense of getting income exempted from income tax thereon under various provisions of income tax legislation. Further

a court has to act on evidence adduced before it, and to give any due weight, if any, to it. A Court should regard such similar figure from any similar notice of assessment as *res inter alios* and consider the evidence with an open mind.

In the instant case, the income as found and assessed by the learned Registrar was income not illegally earned, it should be adopted and accepted by her.

We now deal with another matter. The claim by the plaintiff in this case, by pleadings, was based on loss of dependency under s. 7 of the Civil Law Act 1956, and loss to the estate of the deceased under s. 8 of the same Act. At the hearing however, learned Counsel informed the learned Registrar (at p. 99 of the Appeal Record) that the plaintiff's claim was based on claim for loss of earnings and not for loss of support or dependency, in other words, a claim for lost years by the estate *viz.* under s. 8 of the Act. On being questioned at the hearing before us, learned Counsel confirmed the same.

If the claim was for loss of earnings for lost years, then the learned Registrar has clearly erred in awarding pre-trial and post-trial loss of earnings respectively for 2 periods totalling 18 years which she described as the number of years of purchase. She should have departed from such practice as recommended in *Cookson v. Knowles* [1977] 2 All ER 820 for claims by a living plaintiff for loss of earnings or a dependent of deceased bread-winner for loss of support by dividing the award into 2 parts *viz.* pre-trial loss and future loss from the date of the trial. Instead she should have adopted the practice of *Gammell v. Wilson* [1981] 2 WLR 248 for assessment of damages for, such loss of earnings for loss years by adopting a figure as an appropriate number of years' purchase from the date of death of the deceased plaintiff. The awards herein of pre-trial and post-trial losses cannot stand. This Court will now assess, such loss of earnings.

The principle of such assessment is well settled. The loss to the estate is what the deceased would have been likely to have available, to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest he was reasonably likely to achieve - per Lord Scarman in *Gammell, supra,* at p. 266.

However the assessment in this case presents unusual difficulties but the task remains of arriving at a fair figure to compensate the estate. The difficulties arise from the exclusion from assessment of damages of the sum of RM1,500 per month, the undisputed monthly earnings from the taxi, which was a hefty contribution to the deceased's income as well as a fruitful source of money from which the deceased spent on personal and family expenses. Thus, according to evidence, the deceased's personal expenses which must have come partly from the earnings of the taxi, came to between RM1,000 to RMl,500 per mensem apart from his food expenses at home. Therefore, the stated amount of personal expenses which would otherwise be relevant for assessing the cost of the deceased' s living has been distorted by the Court' s exclusion of earnings of the taxi. The task of arriving at such an fair figure would thus be approaching that sort of pure speculation that faced the Federal Court in *Yang Salbiah v. Jamil bin Harun* [1981] 1 MLJ 292 in which the Federal Court was faced with the task in case of total incapacity involving a child (of 7 years old at the time of accident) of having to assess the loss of future earnings by way of speculation as to the amount of income she would have earned for herself at an appropriate age.

Therefore, out of the monthly earnings of RM898 and to account of the cost of his living, we assess that a sum of RM200 per month being the cost of food for the deceased and another approximate sum of RM200 for deceased's personal expenses could be deducted leaving about RM500 for him to save, or if he liked for spending on his family and so on. The datum of RM500 should be adopted, by using the figure of 16 as the appropriate number of years of purchase to arrive at the figure for loss of earnings for the lost years and from the annuity tables such loss would be about RM65,000 which shall carry no interest.

The order of the learned Registrar made on 3 January 1991 and upheld by the learned Judge in the High Court is therefore set aside and is substituted therefor, the order dated back to 3 January 1991 as follows:

(1) Loss of expectation of life ... RM 6,500.00
(2) Funeral expenses ... RM 4,500.00
(3) Cost of applying for letters of administration ... RM 400.00
(4) Loss of future earnings ... RM65,000.00

All sums above shall carry interest at the usual rates of 4% p.a. and 8% p.a. except for the loss of future earnings which shall carry no interest.

On the question of costs, the plaintiffs have succeeded in part, but they in fact recover less than what was awarded to them by the learned Registrar earlier. We therefore make no order as to costs here but the costs in the Court below remains payable by the defendants and be paid to the plaintiffs by the defendants after taxation.

HASIL BUMI PERUMAHAN SDN. BHD. & 5 ORS.

v.

UNITED MALAYAN BANKING BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
DATO' PEH SWEE CHIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-41-1992]
2 DECEMBER 1993

PRACTICE AND PROCEDURE: Setting aside judgment in default - Whether judgment irregular - Whether there is good defence on merits - Standard of proof - When a order is entered.

The 1st appellant, a housing developer, was granted a bridging finance loan by the respondent. The 2nd, 3rd, 4th, 5th and 6th appellants guaranteed repayment of the loan. It was alleged that the respondent had breached its obligations under the loan agreement and letter of offer and as a result of this the 1st appellant incurred loss of profits, loss of sales and other damages. The appellants filed a writ against the respondent.

The writ of summons and statement of claim was served on the respondent's solicitors on 22 February 1991. On 23 February 1991 appearance was entered and served. When defence was not filed by 16 March 1991, the appellant's solicitor served, on the respondent's solicitors the customary 48 hours notice, requiring the defence to be filed. The respondent's solicitors attempted to seek an extension of three weeks to file the defence but it was futile. On 26 March 1991 the defence was filed and served. On 19 April 1991 judgment in default was entered by the appellants' solicitor but the judgment itself was dated 23 March 1991.

Held:

[1] In a case under O. 19 r. 3, there is no statutory obligation on the part of the solicitors for the appellants to file a draft judgment which is required only in a case under O. 42 r. 8. What was done here was